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*Judgment: approved by the court for handing down
(subject to editorial corrections)**

Delivered: 13/06/2022

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

Between:

A FATHER

Applicant/Appellant

-v-

A MOTHER

Respondent

IN THE MATTER OF EL (A MALE CHILD AGED 11 YEARS 9 MONTHS)

Ms C McKeown BL (instructed by MacManus McCarron Solicitors) for the Father
Ms E Sloane BL (instructed by Cousins Gilmore Solicitors) for the Mother

McFARLAND J

Introduction

[1] This is an appeal from decisions made by Her Honour Judge McCormick QC (“Judge McCormick”) at Craigavon Family Care Centre on 8 June 2021 to refuse the father’s application for a parental responsibility order and a direct contact order.

[2] I have used a randomly selected cipher EL for the child and have anonymised this judgment to protect his identity.

Background

[3] The allocation of an ICOS prefix of 11 reflects that the dispute concerning this young boy’s living arrangements have been before the courts for nearly all of his life. The last set of proceedings concluded in 2015 when there were orders for indirect contact of letters and cards every month and telephone contact every two months. An application for a parental responsibility order was refused.

[4] Subsequent to that order sufficient progress was made and this resulted in EL enjoying weekly direct contact with his father.

[5] In April 2019 the father issued proceedings for a contact order for the stated purpose “to reflect the contact that I am having now” and for a parental responsibility order.

[6] In June 2019 the court involved the Court Children’s Officer in an attempt to find a mediated solution, and by early November 2019 this did achieve a solution with a proposed weekly contact for six hours every Sunday in the father’s home. Unfortunately at or about the time of the matter reaching conclusion the police had cause to raid the father’s home in respect of a drug-related investigation. This resulted in an inability to resolve the matter and there was a holding arrangement whereby weekly contact could take place in the community until such times as clarification could be received concerning the drug-related investigation and in particular whether it exposed EL to any risk when in the father’s home.

[7] Notwithstanding this arrangement the mother did agree to EL seeing his father in the father’s home over Christmas 2019.

[8] At or about this time the father sent text messages to the mother. The content of the text messages was described by Judge McCormick as “entirely unacceptable.” They contained abusive comments concerning the maternal family. On 29 December 2019 the father attended the mother’s home where she was residing with EL and her parents. An altercation took place between the father and the maternal grandfather. EL witnessed the altercation and has steadfastly refused to see his father since then, refusing all forms of indirect and direct contact.

[9] Before the complete lockdown during the Covid-19 pandemic in 2020 the mother relocated to a home owned by her parents in Donegal and the father had cause to contact the police in Donegal falsely claiming breach of a court order and raising false safeguarding issues in respect of EL.

[10] During this period and into 2021 the court attempted to facilitate a solution and the father did write a letter of apology to EL, but without any alteration in the child’s attitude towards the father. The Court Children’s Officer also continued her involvement. She advised that the child was reporting to her that he was scared of his father after the December 2019 incident and still did not want to see him.

[11] In the absence of any solution the matter then came on for hearing on 13 May 2021 when evidence was received. The matter then stood adjourned to receive written submissions and Judge McCormick delivered an oral judgment on 8 June 2021.

Judge McCormick's judgment

[12] The judgment was a fully reasoned judgment running to seven pages of transcript. The judgment set out the history to the case. Judge McCormick stated her view that the mother has and will continue to prioritise EL's needs over and above her "own natural vexation" concerning the father. On that basis, and taking into account the recommendation of the Court Children's Officer, she ordered that a detailed indirect contact regime be put in place, with the hope that this, in time, may lead to consideration of direct contact.

[13] In respect of the parental responsibility order Judge McCormick refused to make the order as she did not consider that such an order would secure or enhance EL's welfare. In particular she referred to the father's lack of clear and consistent commitment, his disparaging comments about the child's maternal relatives, and what was referred to in the judgment as "bare-faced lies" told to the court about the father involving the police in Donegal. She considered that the father's application was driven by the father's need to establish power over the child.

The father's appeal

[14] The appeal is in respect of both orders. The contact order, the father asserts, is too restrictive. He argues that the child's views were given too much weight particularly as they, he states, are influenced by the mother. He further argues that there is no meaningful trajectory or pathway to re-establish direct contact. The 'wait and see' approach is not in the child's best interests.

[15] In relation to parental responsibility, there is no issue concerning paternity and again he argues that Judge McCormick applied too restrictive an approach in analysing the relevance of the father's conduct, which he asserts did not, even taken at its height, fall into a category of egregious conduct that would militate against a refusal of a parental responsibility order.

The law in relation to the appeal

[16] There is broad agreement between the parties as to the law as it applies to appeals from the Family Care Centre and what are the relevant issues in respect of contact orders and parental responsibility orders.

[17] The appellate court should not entertain an appeal unless it can be demonstrated that the first-instance decision was made under a mistake of law, or in disregard of principle, or under a misapprehension of fact or to have involved taking into account irrelevant matters, or omitting from account matters which ought to have been considered, or to have been plainly wrong (see *Re CB* [1993] 1 FLR 920).

[18] A court should take all reasonable steps to maintain contact between a child and a non-resident parent and should consider all available and realistic alternatives before reaching a last resort position of terminating contact. The key consideration is

the welfare of the child. Consideration of the welfare of the child involves the application of the welfare test at Article 3 (3) of the Children (NI) Order 1995:

- “(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- (b) his physical, emotional and educational needs;
- (c) the likely effect on him of any change in his circumstances;
- (d) his age, sex, background and any characteristics of his which the court considers relevant;
- (e) any harm which he has suffered or is at risk of suffering;
- (f) how capable of meeting his needs is each of his parents and any other person in relation to whom the court considers the question to be relevant;
- (g) the range of powers available to the court under this Order in the proceedings in question.”

[19] As the father is not named on the birth certificate he does not exercise parental responsibility but on application a court can make such an order. Although not an exhaustive test, the main factors for consideration are the degree of commitment shown towards the child, the degree of attachment between father and child, and the reasons why the father is applying (see *Re H* [1991] Fam 151 and *Re J-S* [2002] EWCA Civ 1028).

Consideration

[20] Judge McCormick in her analysis of the background correctly identified several key factors. The first was that there was no evidence to indicate that the mother is in any way obstructing contact between EL and his father. She has been the subject of abusive conduct from the father which any right-minded observer could conclude would leave her with a justifiably negative view of the father and how he approaches his responsibility as a father. Despite this she has facilitated contact as exemplified by her conduct after the 2015 court order when indirect contact was established and then evolved into direct contact. She participated in the court directed mediation which resulted in a potential agreement concerning unsupervised contact in the father’s home. That spectacularly failed through no fault of the mother. Notwithstanding the advice and directions from the Court Children’s Officer, the mother still permitted contact within the father’s home over Christmas 2019. It was the father’s confrontational attitude after that that resulted in

the breakdown of contact. Although the father in his skeleton argument argues that the mother is influential in contaminating EL's mind against him, there is no evidence to support this.

[21] Another key factor identified in the judgment is the conduct of the father after Christmas 2019. The text messages were identified by Judge McCormick as entirely unacceptable. That is an appropriate assessment. The text messages were then followed by the confrontation orchestrated by the father on 29 December 2019 and acted out in the presence of the child. It, as Judge McCormick surmised, "was always going to end badly." The father chose to conduct himself in an entirely inappropriate manner in front of his son. Judge McCormick also noted the absence of any apology until the court ordered him to send one to the child over a year later.

[22] Judge McCormick then dealt with the involvement of the police when the mother went to Donegal with the child. This was not identified as a call to the police out of concern for the child but rather a vindictive call to create problems for the mother, and conduct that the father had foreshadowed by a threat to the mother's partner by Facebook message. The father's excuse for his conduct to the court was dismissed by Judge McCormick as a "bare-faced lie."

[23] These two factors had resulted in what Judge McCormick described as the father having "effectively strangled the relationship with his child".

[24] On any analysis of the evidence presented before Judge McCormick these conclusions were well supported and could not be considered to be wrong in any way.

[25] Judge McCormick then went on to consider the assessment and recommendations of the Court Children's Officer. Those recommendations were to establish an indirect contact regime with the father sending letters, cards and presents every two months, with an extra contact when Easter falls in March. The Court Children's Officer must be commended for her involvement in this case as she was able to shift the boy's position from outright hostility to any form of contact to at least consideration of looking at cards and letters from the father. The mother is to use a memory box to house these items, with the box being accessible to EL. In addition the mother was to facilitate the child in replying to his father.

[26] This recommendation followed engagement by the Court Children's Officer with the child to ascertain his wishes and feelings. Those wishes and feelings were clear. There is no evidence to suggest that these wishes and feeling have been influenced by the mother. If anything, they have been influenced by the father and his conduct.

[27] The expressed wishes of a child who was 10 years old at the time is only one of the factors to be taken into account. It has to be acknowledged that a child of this age and maturity will not have a full understanding of the issues and should not be allowed to dictate outcomes as to his life. Other factors include his emotional needs

and the likely effect on him of being forced into direct contact with his father. On any assessment such a course is very likely to be counter-productive. Whilst it is important that EL should have the opportunity to enjoy a relationship with his father, at this stage the father needs to demonstrate that he is committed to having contact with his child, that any contact will not be harmful to the child and that contact will be beneficial to the child.

[28] There has been unfortunate delay in hearing the appeal, with the eventual hearing taking place on the anniversary of the first instance decision. The delay has however afforded an opportunity to both parents to implement the indirect contact regime and to display their commitment to the importance of the contact between EL and the father. The mother has implemented it fully at her end. The father has been unable to do so. Of the six indirect contacts during this period he has only availed of two. When pressed, his counsel was unable to offer any adequate explanation as to why that is. It is not considered a significant burden to send a letter or card and a small present every two months, but it would appear that it is for the father. Judge McCormick identified the purpose of the indirect contact as 'keeping the door open' but it is the father who is failing to do this by refusing to avail of the contact.

[29] On my analysis of the evidence presented in this case the decision of Judge McCormick on the issue of contact could not be considered to be wrong, never mind, plainly wrong. In fact a proper conclusion is that it was plainly correct.

[30] Turning to the other issue relating to parental responsibility, Judge McCormick dealt with this comprehensively in her judgment. She took into account the father's conduct and concluded that his motivation was to establish power over the child. This was based on her assessment that the father's attitude to all aspects of the litigation as a "contest ground between him and the mother." His conduct after the order confirms this assessment as the father appears disinclined to avail of the conduct available to him.

[31] The main factors for consideration are the degree of commitment shown towards the child, the degree of attachment between father and child, and the reasons why the father is applying. In each of these factors the father has been found, by the evidence, to be wanting. His commitment to the child could, on the one hand, be considered to be persistent, but that persistence has been correctly identified by Judge McCormick as being focussed on adult issues and a dispute with the mother. It has shown no real commitment to the child. As Judge McCormick stated in her judgment he has not taken up any opportunity to support the child in any practical way. This includes financial contributions but also more routine matters such as attending school sports day. In fact, his failure to avail of contact after the order speaks volumes to the level of his commitment. The degree of attachment, at this stage, is very poor, largely as a result of the attitude and conduct of the father. His motivation in making this application has more to do with establishing his power rather than promoting the child's welfare.

[32] In coming to her conclusion, Judge McCormick did consider the flow of

information about the child from the mother to the father concerning issues about education and health. These are the bread and butter issues pertaining to parental responsibility. The making of an order to ensure that this occurs was considered, however Judge McCormick was satisfied that the mother would continue to fulfil her obligations concerning this without the need for a court order.

[33] As in the case of the contact order, I consider that Judge McCormick was entirely correct in determining that she should not make a parental responsibility order in favour of the father as it would do little to enhance the welfare of EL.

Conclusion

[34] In all the circumstances, and for the reasons given, this appeal is dismissed and the order of the Family Care Centre is affirmed. There will be no order as to costs but there will be the usual taxation order for any legally assisted party.